IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL WRIT PETITION NO.2314 OF 2004

Shahid Hussain Iqbal Shaikh
@ Kanya Babu, Age: 22 years,
r/o Room No.C/1, Chawl No.4,
Yash Mistry Chawl, Parsiwadi,
Ghatkopar (West),
Mumbai-400 086.
{At present detained in Nasik
Road Central Prison, Nasik} .... Petitioner

- Versus -

1. Shri A.N. Roy,
   Commissioner of Police,
   Brihan Mumbai.
2. The State of Maharashtra
3. The Superintendent,
   Nasik Road Central Prison,
   Nasik. .... Respondents

Shri U.N. Tripathi for the Petitioner.
Shri D.S. Mhaispurkar, Addl. Public Prosecutor, for the Respondents.

CORAM: R.M.S. KHANDEPARKAR &
P.V. KAKADE, JJ.
DATED: FEBRUARY 21, 2005

ORAL JUDGMENT (Per R.M.S.Khandeparkar, J.):

1. Heard. The petitioner/detenu challenges the order of detention dated 6-9-2004 issued against him by the respondent No.1 in exercise of the powers conferred by sub-section (2) of Section 3 of the Maharashtra Prevention of Dangerous Activities of Slumlords, Bootleggers, Drug-offenders and Dangerous Persons Act, 1981, hereinafter referred to as "the MPDA Act" r/w the Government Order, Home Department (Special) No.DDS-1303/10/Part-II/SPL-3(B), dated 23-6-2004 and stated to have been issued with a view to preventing the petitioner/detenu from acting in any manner prejudicial to the maintenance of the public order.

2. The challenge to the impugned order of detention is on the ground that the detaining authority failed to apply its mind to the fact that the petitioner had been in judicial custody for more than five months and had

not applied for bail for nearly three months and there was no possibility of the petitioner being released on bail and that, therefore, the order of detention was not warranted and that the same discloses that the subjective satisfaction stated to have been arrived at for the purpose of detention of the petitioner is vitiated. On the other hand, it is the case of the respondents that the point relating to the availability of bail was considered by the detaining authority before issuing the order of detention and therefore there is no case for interference in the impugned order on the alleged ground.

3. It is the contention on behalf of the petitioner that the order of detention is thoroughly unwarranted and unjust since the petitioner was already in custody consequent to registration of the C.R. No.117/04 as well as C.R. No.126/04 with effect from May, 2004 and further that considering the nature of the allegations in the complaints, there was no likelihood of release of the petitioner on bail. The learned Advocate for the petitioner has submitted that in both the cases the petitioner had in fact applied for bail and the same was rejected by the Sessions Court as well as by this Court taking into consideration the allegation regarding the role stated to have been played by the petitioner in the

alleged incidents and considering the seriousness of the offence. Being so, according to the learned Advocate for the petitioner, the detaining authority ought to have considered that there was no possibility of availability of bail to the petitioner even though successive applications for bail are not barred. The detaining authority having not considered the same, the impugned order is clearly vitiated. Further submission is that there was no justifiable ground for the detaining authority to arrive at the subjective satisfaction regarding the need for issuance of the detention order to detain the petitioner in preventive custody. Reliance is placed in the decisions in the matters of **Rameshwar Shaw v. District Magistrate, Burdwan and another,** reported in AIR 1964 SC 334, **Dharmendra Suganchand Chelawat and another v. Union of India and others,** reported in AIR 1990 SC 1196, **Rivadeneyta Ricardo Agustin v. Government of the National Capital Territory of Delhi and others,** 1994 Supp (1) SCC 597, **Rajesh Gulati v. Govt. of NCT of Delhi and another,** reported in 2002 SCC (Cri.) 1627 and an unreported decision of the Division Bench of this Court in the matter of **Smt. Chandradevi Jaiswal v. Shri M.N. Singh and others** {Criminal Writ Petition No.973 of 2001} delivered on 5-9-2001.

4. The learned A.P.P., on the other hand, has submitted that the detaining authority was fully aware of the fact that the petitioner was already in judicial custody pursuant to the complaints registered against him and his bail application having been rejected by the Sessions Court as well as by this Court. However, the detaining authority, taking into consideration the availability of the facility of successive bail applications to the persons in custody and considering the fact that the offences for which the petitioner was in custody were not punishable with life imprisonment or death sentence, the availability of bail being not totally ruled out, considered it necessary to issue the detention order against the petitioner. Reliance is placed in the decisions in the matters of **Ahamed Nassar v. State of Tamil Nadu and others,** reported in (1999) 8 SCC 473, **Amritlal & Ors. v. Union Government, Ministry of Finance & Ors.,** reported in 2001 (I) L.J. 401 and an unreported decision of the Division Bench of this Court in the matter of **Shri Mohamed Hussein @ Langda Hussein s/o Abxubakar Sheikh v. Shri M.N. Singh and others** {Criminal Writ Petition No.1262 of 2002} delivered on 24-7-2003.

5. The fact that the petitioner was in judicial custody consequent to registration of the C.R. Nos.117 and 126

of 2004 in the month of May, 2004 is not in dispute. It is also not in dispute that the bail applications filed by the petitioner were rejected by the Sessions Court as well as by this Court in relation to the said complaints. It is also not in dispute that there is no bar against filing successive bail applications. The contention, however, is that mere availability of bail application cannot be a ground to justify the subjective satisfaction of the detaining authority for the purpose of issuance of the detention order when the person to be so detained is already in jail consequent to rejection of his bail application and further that the allegations against him are of a serious nature which may not justify grant of bail, whereas it is the defence of the respondents that in the absence of offence being punishable with life imprisonment or death sentence and taking into consideration the overall view taken and the principle followed by the Courts in relation to bail matters being the bail and not jail, the availability of bail to the petitioner cannot be ruled out and therefore there was proper consideration of the said aspect of the matter while arriving at the subjective satisfaction regarding the necessity for issuance of the order of detention against the petitioner.

6. The learned Advocate for the petitioner, referring

to the decision of the Apex Court in **Rameshwar Shaw's** case (supra), has submitted that the Apex Court therein has clearly ruled that before an authority comes to the finding regarding the necessity of detaining a person in custody to prevent him from acting in a prejudicial manner, it is necessary that the authority should be satisfied that if such person is not detained, he would act in a prejudicial manner and that itself would disclose the inevitable necessity to curtail his freedom which would require the authority to take into consideration whether at the time of issuance of the detention order such person is already in custody or a free citizen. Undoubtedly, in Rameshwar Shaw's case the Apex Court had held that before an authority can legitimately come to the conclusion that the detention of the person is necessary to prevent him from acting in a prejudicial manner, the authority has to be satisfied that if the person is not detained, he would act in a prejudicial manner and that inevitably postulates freedom of action to the said person at the relevant time and if the person is already in jail, it cannot rationally be postulated that if he is not detained, he would act in a prejudicial manner. However, the Apex Court before arriving at the said conclusion had observed that:

> "As abstract proposition of law, there may not be any doubt that S.3(1)(a) does not preclude the authority from passing an order of detention against a person whilst he is in detention or in jail; but the relevant facts in connection with the making of the order may differ and that may make a difference in the application of the principle that a detention order can be passed against a person in jail. ..... the question as to whether an order of detention can be passed against a person who is in detention or in jail, will always have to be determined in the circumstances of each case."

The basis for issuing an order of detention under Section 3(1) of the Act being the satisfaction of the detaining authority in that regard based on the facts disclosed from the materials placed before the detaining authority before issuance of such order, and the same were totally absent in the case of Rameshwar Shaw, as the detenu therein was arrested on 25-1-1963 and ever since he was in custody. Even on 15-2-1963, when the order of detention was served on him, he was in jail

custody. After referring the facts of the said case, the Apex Court has observed that:

> "The first stage in the process is to examine the material adduced against a person to show either from his conduct or his antecedent history that he has been acting in a prejudicial manner. If the said material appears satisfactory to the authority, then the authority has to consider whether it is likely that the said person would act in a prejudicial manner in future if he is not prevented from doing so by an order of detention. If this question is answered against the petitioner, then the detention order can be properly made."

With the above observations it has been held that:

> "The satisfaction that it is necessary to detain a person for the purpose of preventing him from acting in a prejudicial manner is thus the basis of the order under S.3(1)(a), and this

basis is clearly absent in the case of the petitioner."

Obviously, the detaining authority in the case of Rameshwar Shaw had not addressed itself to the relevant issue and, therefore, the Apex Court had observed that the basis for issuance of the order under Section 3(1) i.e. the necessity to detain a person for the purpose of preventing him from acting in a prejudicial manner inspite of he being already in custody were absent and the detaining authority therein had failed to apply its mind to the said aspect of the matter, and therefore the detention order was held to be bad in law.

7. In the case in hand, the affidavit in-reply filed by the respondents disclose that the detaining authority was aware of the fact that the petitioner was in judicial custody in respect of the said two C.Rs in which he was arrested. The authority was also aware of the fact that the detenu had applied for bail in the Sessions Court as well as in the High Court and both the applications were rejected. The detaining authority was also aware that there is no embargo or bar for filing successive bail applications and further the fact that the Courts have entertained such applications in case of failure to file the chargesheet in time or with the

passage of time, or on medical grounds, besides the fact that the C.Rs registered against the petitioner did not disclose the offences punishable with life imprisonment or death sentence. Obviously it is the case of the respondents that the fact that the detenu can be released on bail as the facility of bail was available to the detenu was considered by the detaining authority. However, the grievance of the learned Advocate for the petitioner is that mere consideration of availability of bail facility does not amount to taking into consideration the cogent materials for the subjective satisfaction regarding the need of the petitioner being subjected to order of detention inspite of he being already in custody. The contention is that it is not the mere availability of the bail facility but the consideration of the substance of accusation which could entitle a person to get the bail which ought to have been considered and in the absence thereof the subjective satisfaction of the detaining authority stands vitiated and consequently the order of detention is rendered bad in law, and in that connection attention is drawn to the decision in **Dharmendra Suganchand Chelawat's** case (supra).

8. The Apex Court in Dharmendra Suganchand Chelawat's case, after considering various earlier decisions,

including **Ramesh Yadav v. District Magistrate, Etah** {AIR 1986 SC 315}, **Rameshwar Shaw** {supra}, **Masood Alam v. Union of India** {AIR 1973 SC 897}, **Dulal Roy v. District Magistrate, Burdwan** {AIR 1975 SC 1508}, **Vijay Kumar v. State of Jammu & Kashmir** {AIR 1982 SC 1023}, **Alijan Mian v. District Magistrate, Dhanbad** {AIR 1983 SC 1130}, **Suraj Pal Sahu v. State of Maharashtra** {AIR 1986 SC 2177}, **Binod Singh v. District Magistrate, Dhanbad, Bihar** {AIR 1986 SC 2090}, **Smt. Shashi Aggarwal v. State of U.P.** {AIR 1988 SC 596}, **Vijay Kumar v. Union of India** {AIR 1988 SC 934} and **N. Meera Rani v. Govt. of Tamil Nadu** {AIR 1989 SC 2027}, held that:

> "The decisions referred to above lead to the conclusion that an order for detention can be validly passed against a person in custody and for that purpose it is necessary that the grounds of detention must show that (i) the detaining authority was aware of the fact that the detenu is already in detention; and (ii) there were compelling reasons justifying such detention despite the fact that the detenu is already in detention . The expression "compelling reasons" in the

> context of making an order for detention of a person already in custody implies that there must be cogent material before the detaining authority on the basis of which it may be satisfied that (a) the detenu is likely to be released from custody in the near future and (b) taking into account the nature of the antecedent activities of the detenu, it is likely that after his release from custody he would indulge in prejudicial activities and it is necessary to detain him in order to prevent him from engaging in such activities."

Obviously therefore, the learned Advocate for the petitioner is justified in contending that the detaining authority must consider cogent materials to arrive at his subjective satisfaction regarding the need for issuance of order of detention of a person who is already in custody. At the same time, it is to be noted that consideration of the cogent materials has to be appreciated by the Court in writ jurisdiction from the point of view of subjective satisfaction of the authority and not as if sitting in appeal or review of the decision arrived at by the detaining authority.

Bearing this in mind, one has to ascertain whether in the case in hand the detaining authority had considered cogent materials for the purpose of arriving at the subjective satisfaction regarding the need of the petitioner to be brought under the net of detention order inspite of the fact that the petitioner was already in judicial custody.

9. As already observed above, the detaining authority has clearly disclosed that the fact that the petitioner was already in judicial custody, that his bail applications were rejected by the Sessions Court as well as by this Court, that there is no bar or embargo against filing successive bail applications, that the complaints against the petitioner did not disclose the offence punishable with life or death sentence, that normally the Courts are inclined to grant bail to such accused in case of delay in filing the chargesheet or with passage of time or even after the filing of the chargesheet that many a times the accused are released on temporary bail on the ground of medical reason, etc., and all these aspects were considered by the detaining authority before passing the order of detention. It is to be noted that consideration of cogent materials is for the purpose of subjective satisfaction of the detaining authority regarding the need of clamping the

detention order on a person. Such a satisfaction is not on par with that of a judicial officer's order on the bail application of an accused.

10. Attention was also drawn to the decision in **Rivadeneyta Ricardo Agustin's** case (supra) wherein the detention order was held to be bad as it fell short of the requirement enunciated by the Apex Court in **Kamarunnissa v. Union of India** {(1991) 1 SCC 128}. In **Kamarunnissa's** case (supra) the ruling of the Apex Court was to the effect that:

> "detention orders can validly be passed against detenus who are in jail, provided the officer passing the order is alive to the fact of the detenus being in custody and there is material on record to justify his conclusion that they would indulge in similar activity if set at liberty."

In **Rivadeneyta Ricardo Agustin's** case the Apex Court had held that the requirements of the decision in Kamarunnissa's case were not satisfied because in the said case the grounds of detention did not disclose that the release of the detenu on bail was likely or that it

was imminent. In other words, the ruling of the Apex Court in Rivadeneyta Ricardo Agustin's case is to the effect that the subjective satisfaction arrived at by the detaining authority should disclose consideration of the likelihood of release of the detenu or such a release being imminent and if this aspect is disclosed, the order of detention cannot be held to be vitiated.

11. Reverting to the facts of the case in hand, as already narrated above, the same clearly discloses various aspects regarding the availability of the bail being considered by the detaining authority, including the fact that the offences for which the petitioner was in judicial custody were not punishable with life imprisonment or death sentence, coupled with the fact that there is no bar or embargo against the filing of successive bail applications and normal trend is that the Courts normally grant bail whenever there is either delay in filing the chargesheet or even after the filing of the chargesheet on consideration of the nature of the offences. As already observed above, while considering this aspect, the High Court in writ jurisdiction cannot review the decision of the detaining authority. Being so, the sufficiency of the materials to arrive at the subjective satisfaction regarding the need for issuance of the detention order against the person who is already

in custody cannot be the subject-matter for adjudication in writ jurisdiction.

12. Attention was also drawn to para 13 of the decision in **Rajesh Gulati's** case (supra) wherein the Apex Court has held that:

> "the detaining authority's satisfaction consisted of two parts - one: that the appellant was likely to be released on bail and two: that after he was so released the appellant would indulge in smuggling activities. The detaining authority noted that the appellant was in custody when the order of detention was passed. But the detaining authority said that "bail is normally granted in such cases". When in fact the five applications filed by the appellant for bail had been rejected by the courts (indicating that this was not a "normal" case), on what material did the detaining authority conclude that there was "imminent possibility" that the appellant would come out on bail? The fact that the appellant was subsequently

released on bail by the High Court could not have been foretold."

Undoubtedly therefore, in Rajesh Gulati's case, five bail applications were rejected and it apparently discloses that it was not a case where the bail could have been granted and yet the detaining authority concluded that there was imminent possibility of the detenu coming out on bail. As already observed above, the Apex Court in **Dharmendra Suganchand Chelawat** and **Rivadeneyta Ricardo Agustin's** case has clearly held that it should be either "the likelihood of release" or the "imminent possibility of release". In the case in hand, the detaining authority has nowhere stated that there was imminent possibility of the petitioner being released on bail. The specific averment in that regard is that he could be likely to be released on bail. It is not the case of successive bail applications and refusal thereof. Besides, as already observed above, the detaining authority has also taken into consideration the fact that the allegations against the petitioner in the complaints filed against him do not disclose the offences punishable with life imprisonment or death sentence and therefore the possibility of he getting the bail in case of delay in filing the chargesheet or even after the filing of the chargesheet,

including the possibility of availing such facility on medical grounds was duly considered.

13. The decision in **Smt. Chandradevi Jaiswal's** case (supra) is of no help to the petitioner. That was a case wherein the Division Bench had held that the Apex Court had held in Chelawat's case that there should be a positive assertion in the grounds of detention that the detenu is in detention, however, in Chandradevi's case there was no positive assertion that the detenu was in custody. Apparently, that was in a totally different set of facts and a different point for consideration and therefore the same is of no help to the petitioner in the facts and circumstances of the case in hand and the points involved in the matter.

14. In **Ahamed Nassar's** case (supra), the Apex Court, after taking note of various decisions, including the decision in Kamarunnissa as well as in Rivadeneyta Ricardo Agustin's cases, as well the facts of the case before the Apex Court, held that:

> "..... in spite of rejection of the bail application by a court, it is open to the detaining authority to come to his own satisfaction based on the

> contents of the bail application keeping in mind the circumstances that there is likelihood of the detenu being released on bail. Merely because no bail application was then pending is no premise to hold that there was no likelihood of his being released on bail. The words "likely to be released" connote chances of being bailed out, in case there be pending bail application or in case if it is moved in future is decided. The word "likely" shows it can be either way."

Obviously therefore, each case will have to be decided based on the facts of that case and what could be the relevant material would vary according to the facts of each case.

15. In **Amritlal's** case (supra) the decision of the Apex Court was based on the peculiar facts of the case wherein the Court also considered the scope of the expression "likelihood of the petitioner being released on bail" to mean "available cogent material for coming at the subjective satisfaction regarding the release of the accused on bail. In that regard, it was observed by

the Apex Court thus: "Available cogent material is the likelihood of having a bail application moved in the matter but not obtaining a bail order." Obviously the detaining authority did not apply its mind to the issue as to whether there was a possibility of the accused (detenu) being released on bail in the matter and passed the order merely on the basis that the application for bail could be moved by the accused (detenu). The said decision does not help either the petitioner or the respondents. Similar is the case in relation to the decision in the matter of **Shri Mohamed Hussein @ Langda Hussein** (supra) which is purely in the facts of that case and does not help either of the parties.

16. In a recent decision in the matter of **Union of India v. Paul Manickam and another,** reported in (2003) 8 SCC 342, the Apex Court while dealing with the issue in relation to the need for consideration of availability of bail to the person who is already in custody and how to deal with such a situation in case there is necessity of issuing detention order against such person, it has held therein thus:

> "Where detention orders are passed in relation to persons who are already in jail under some other laws, the

detaining authorities should apply their mind and show their awareness in this regard in the grounds of detention, the chances of release of such persons on bail. The necessity of keeping such persons in detention under the preventive detention laws has to be clearly indicated. Subsisting custody of the detenu by itself does not invalidate an order of his preventive detention, and the decision in this regard must depend on the facts of the particular case. Preventive detention being necessary to prevent the detenu from acting in any manner prejudicial to the security of the State or to the maintenance of public order or economic stability etc., ordinarily, it is not needed when the detenu is already in custody. The detaining authority must show its awareness to the fact of subsisting custody of the detenu and take the factor into account while making the order. **If the detaining authority is reasonably satisfied with cogent materials that there is**

> **likelihood of his release and in view of his antecedent activities which are proximate in point of time, he must be detained in order to prevent him from indulging in such prejudicial activities, the detention order can be validly made.** Where the detention order in respect of a person already in custody does not indicate that the detenu was likely to be released on bail, the order would be vitiated."
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> (emphasis supplied)

17. As the facts of the case in hand disclose that the materials which were considered by the detaining authority were cogent materials which included the fact that the offences for which the petitioner was arrested did not contain the offence punishable with life imprisonment or death sentence, that there is no bar or embargo upon filing successive bail applications, that it is only one application for bail which was rejected by the Sessions Court and the High Court, that normally the practice followed by the Courts is to grant bail in case there is any delay in filing the chargesheet or even after the filing of the chargesheet considering the

nature of the allegations and the possibility of releasing the accused on medical grounds and, therefore, the detaining authority in the case in hand cannot be accused of not considering the cogent materials for the purpose of subjective satisfaction necessary to justify the detention of the petitioner. The analysis of the materials and the opinion formed by the detaining authority discloses that the detaining authority was subjectively satisfied on the basis of the cogent materials that there was likelihood of release of the petitioner on bail and considering his antecedent activities which obviously were proximate in point of time, the order passed by the detaining authority cannot be said to be invalid or that the satisfaction was arrived at without cogent materials.

18. As there is no other ground on which the impugned order is challenged, since the ground of challenge is devoid of substance, the petition fails and is hereby dismissed. The rule is discharged with no order as to costs.

[25]

(R.M.S.Khandeparkar, J.)

(P.V.Kakade, J.)